

BEFORE THE THREE MEMBER HEARING PANEL CONVENED  
PURSUANT TO RSMO SECTION 162.961

and			
Parents of PETITIONER	,	a minor,	)
		Petitioners,	)
v.			)
EL DORADO SPRINGS R-II SCHOOL DISTRICT,			)
		Respondent.	)

**RESPONDENT'S FINDINGS OF FACT,**  
**CONCLUSIONS OF LAW AND DECISION**

**The Parties**

1. Petitioner and his parents currently reside in, Missouri, within the boundaries of the District.
2. Petitioner and his parents were not represented by counsel at the hearing.
3. Respondent was represented at the hearing by Shellie L. Guin of Doster, Mickes, James & Ullom, LLC, 4600 Madison, Suite 711, Kansas City, MO 64112.
4. The Hearing Panel for the due process proceeding was: Mr. Robert P. Baine, Jr., Hearing Panel Chair; Ms. Beth Mollenkamp, Panel Member; Dr. Kim Ratcliffe, Panel Member.

**Procedural Background**

5. On or about March 15, 2004, Petitioner's mother sent a due process hearing request to the Missouri Department of Elementary and Secondary Education ("DESE"). (Transcript of Proceedings, August 24, 2004, p. 223: 18-25; 224; 1-6; Ex. 1).
6. The Hearing was held on August 24, 2004. (Tr. 1).
7. The Panel finds that the parties provided exhibits and witness lists to one another and the Panel in a timely manner. The record shows that the parties exchanged exhibits in April 2004. Specifically, the Respondent's exhibits were supplied to the Panel and the Parents in April 2004, and a few supplemental pages of exhibits, which were ultimately not relevant and not admitted, were supplied to the Panel Chair and the Parents at least seven days before the hearing, and to the remaining Panel Members during the week preceding the hearing.

### **The Issues and Relief Requested**

8. The Parent's due process hearing request complained of the District's failure to develop a Behavioral Intervention Plan ("BIP"), prior to March 15, 2004, despite the Parents' requests for one before that time. The Parents claimed that because no BIP was in place, Petitioner was being punished for his disability. (Tr. 249: 15-23; Ex. 1).

9. During the hearing, the Panel clarified and limited the issue as follows: Whether Petitioner received a free appropriate public education ("FAPE") during the 2003-2004 school year, up to and including March 15, 2004, despite the lack of a BIP. (Tr. 117: 9-25; 118: 1-25; 119: 1-6; 121: 24-25; 122: 1-7).

10. In accordance with this statement of the issues, the Panel limited the evidence presented to encompass the time period beginning with the 2003-2004 school year or about March 15, 2003.<sup>1</sup> (Tr. 117: 9-25; 118: 1-25; 119: 1-6; 121: 24-25; 122: 1-7; 131: 5-24; 161: 15-25; 162: 1-25; 163: 1-12; 223: 18-25; 224: 1-6; Ex. 1).

### **Factual Background**

11. Petitioner is Learning Disabled in the area of Written Expression. (Ex. 6). As a result, he is eligible for special education services. (Ex. 6).

12. Petitioner has been medically diagnosed as having Attention Deficit Hyperactivity Disorder ("ADHD"), a condition for which he takes medication. (Tr. 177: 19-22; Ex. 6).

13. Petitioner has never been eligible for special education due to his ADHD. (Tr. 98: 13-17).

14. Petitioner had an Individualized Education Program ("IEP") in place during his fifth grade school year. (Tr. 139: 18-23).

15. In April 2003, a BIP was developed for Petitioner for fifth grade. (Tr. 139: 18-25; 140: 1-3; 229: 10-25; 230: 1-12; Ex. F).

16. Petitioner's fifth grade BIP addressed compliance with teacher requests. (Ex. F). In addition, the BIP provided the opportunity for Petitioner to go to the resource room if he had a substitute teacher, if his schedule changed, or if he needed help in class. (Tr. 189: 14-24; Ex. F) The BIP also included a "token

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<sup>1</sup> The IEP team developed a BIP on June 7, 2004. The appropriateness of this BIP was not at issue in the hearing, however, because the Panel limited the relevant time frame to the 2003-2004 school year, prior to the Parents' due process hearing request.

system,” whereby Petitioner could receive smiley faces for compliant behavior. (Tr. 189: 25; 190: 1-2; Ex. F).

17. The fifth grade BIP specifically indicated that Petitioner would still serve in-school and out-of-school suspensions when imposed for disciplinary purposes. (Tr. 190: 6-9; Ex. F).

18. Under Petitioner’s fifth grade BIP, he was still subject to regular discipline. (Tr. 190: 6-14; Ex. F).

19. At the end of his fifth grade year, Petitioner had the following grades: One “B-,” one “C,” four “D’s,” one “F,” and three “S’s.” (Ex. 2).

20. During the 2003-2004 school year, Petitioner was in the sixth grade. (Tr. 31: 10-15; Ex. 6).

21. When Petitioner entered sixth grade, he was in middle school instead of elementary school, which meant that instead of being in one classroom, he changed classes every hour. (Tr. 132: 14-25). Consequently, the transition from elementary school to middle school requires students to undergo a big adjustment in their organizational skills. (Tr. 132: 14-25).

#### **Sixth Grade IEP**

22. Petitioner’s sixth grade IEP was developed on or about September 8, 2003. (Ex. 6).

23. If the parents had asked for a BIP during the September 8, 2004 IEP meeting, the school district would have suggested that Petitioner be given a chance to adjust to middle school first before deciding whether a plan was needed. (Tr. 180: 3-17; 182: 3-11-14).

24. Petitioner’s September 8, 2003 IEP did not contain a BIP. (Tr. 99: 15-22; Ex. 6).

25. Petitioner’s September 8, 2003 IEP allowed him to go to the resource room , the principal, or his counselor whenever he needed a cooling off period. (Tr. 190: 21-25; 191: 1-9; Ex. 6).

26. Petitioner’s September 8, 2004 IEP noted that at times he exhibits inappropriate outbursts of talking and making noises that are disruptive to the regular classroom. (Ex. 6).

27. However, during the September 8, 2004, IEP meeting, Petitioner’s IEP team determined that Petitioner did not exhibit behaviors that impeded his learning or the learning of others. (Ex. 6).

28. Petitioner’s September 8, 2003 IEP included a modified grading scale (50% or more is passing), which was to occur on a daily basis. (Ex. 6). The IEP also included the following modifications and accommodations, which were to be employed as needed: study guides; adapted or simplified

tests/material; note taking assistance; teacher-provided notes; oral/modified tests/exams; preferential seating; assignment directions given in a variety of ways; oral cues/prompts; avoid penalizing for spelling errors or penmanship; use of positive/concrete reinforcers. (Tr. 100: 1-25; 101: 1-14; Ex. 6).

29. These modifications and accommodations were designed to address Petitioner's disability, as well as areas outside of his area of categorical eligibility for special education services. (Tr. 174: 12-18).

30. These modifications and accommodations were designed to provided Petitioner with an educational benefit. (Tr. 174: 19-25; 175: 1-4).

31. Petitioner's September 8, 2003 IEP was reasonably calculated to provide Petitioner with an educational benefit for the school year. (Tr. 171: 15-21).

32. An IEP meeting was held on October 3, 2003, at the Parents' request. (Tr. 102: 13-25; 171: 1-7; Ex. 8).

33. By October 3, 2003, Petitioner had received three 8<sup>th</sup> hours since the beginning of school for talking out, fidgeting and making noises. (Ex. 8).

34. Eighth hours do not result in the loss of any instructional time because they are served after the end of the school day. (Tr. 135: 24-25; 143: 6-7).

35. Petitioner exhibited normal sixth grade behaviors in the classroom. (Tr. 47: 8-15).

36. At the October 3, 2003 IEP meeting, the IEP team discussed strategies for Petitioner, including that Petitioner could get a new AR book or take an AR test in Mrs. Shimek's room as a reward or alternative, that Petitioner could use a stress ball in place of tapping or fidgeting, or that Petitioner could sit in the back of the room or go out into the hall if needed. (Ex. 8). The strategies used for Petitioner are strategies and interventions offered to or used with all 6<sup>th</sup> grade students. (Tr. 111: 10-13).

37. At the end of the October 3, 2003 IEP meeting, the IEP team had reached a consensus and was in agreement as to how to proceed. (Tr. 192: 13-25; 193: 1-10; Ex. 8).

38. After the October 3, 2003 IEP meeting, Petitioner's middle school counselor observed Petitioner in class several times. (Tr. 103: 18-21; 104: 1-8; Ex. 10).

39. In math class, Petitioner's counselor observed Petitioner ask to go into the hall to do his work, which was a modification allowed in his IEP. (Tr. 105: 5-17; Ex. 10). When he went into the hall, he worked on his assignment and seemed to do fine. (Tr. 105: 5-17; Ex. 10).

40. Petitioner's counselor also observed Petitioner in study skills class. (Tr. 105: 18-19; Ex. 10). On the day she observed him, he was one of the better behaved students in the class. He finished his assignment and then helped other students with their assignments. (Tr. 105: 18-25; 106: 1-7; Ex. 10).

41. An IEP meeting was held again on October 31, 2003, at the Parents' request. (Tr. 103: 18-25; 171: 1-7; Ex. 10).

42. At the October 31, 2003 IEP meeting, the team discussed that Petitioner's behavior did not stand out and he seemed to want to do well and participate. (Ex. 10). In addition, no recent behavioral problems were noted. (Ex. 10).

43. Although at the October 31, 2003 IEP meeting Petitioner's Mother requested that she be contacted before Petitioner gets an 8<sup>th</sup> hour, she indicated that she understood that Petitioner would still receive 8<sup>th</sup> hours for normal disciplinary reasons. (Tr. 107: 9-25; 108: 1-5; Ex. 10). There was never an understanding or promise that Petitioner would not receive 8<sup>th</sup> hours. (Tr. 107: 9-25; 108: 1-5; Ex. 10).

44. At the end of the October 31, 2003 IEP meeting the IEP team had reached a consensus and was in agreement on how to proceed. (Tr. 193: 11-25; 194: 1-15; Ex. 10).

45. At no time did the IEP team agree that Petitioner would not be subject to normal school discipline such as 8<sup>th</sup> hours or office referrals. (Tr. 108: 6-10; Ex. 6).

46. Having a BIP does not prevent a student from receiving 8<sup>th</sup> hours, in-school detention or other discipline. (Tr. 176: 1-11).

47. At the time of the October IEP meetings, Petitioner was receiving educational benefit based on his grades and receipt of positive reports from teachers, his middle school counselor, and principal. (Tr. 171: 22-25; 172: 1-10).

48. The school district members of the IEP team did not believe that a BIP was needed during the time period at issue because Petitioner was doing well academically and behaviorally and was making progress toward his IEP goals. (Tr. 95: 12-17; 97: 1-3, 15-25; 98: 1-4; 99: 20-24; 109: 12-22; 142: 3-10, 23-25; 170: 8-20; 171: 1-14; Ex. 6).

49. The middle school provided more behavior strategies and interventions for Petitioner during his sixth grade year than what his fifth grade BIP had required. (Tr. 139: 18-25; 140: 1-4; Exs. 6, 8, 10, F).

50. None of Petitioner's progress reports ever indicated that he was failing to progress on his IEP goals. (Tr. 171: 21-25).

51. Each progress report showed that Petitioner was making progress toward his IEP goals. (Tr. 172: 12-20).

52. Petitioner received educational benefit from his sixth grade IEP. (Tr. 173: 1-5).

53. After the March 19, 2004 IEP meeting, it was apparent that the IEP team was not in agreement and that the Parents were insisting that the team develop a BIP as part of Petitioner's IEP, so the Parents were supplied with a Notice of Action Refused. (Exs. 13, 15).

### **Sixth Grade Academic Performance**

54. At first quarter, Petitioner was receiving "A's" in science, basic life skills, an "A-" in English, a "B+" in social studies, a "C-" in study skills, and "F's" in physical education and math. (Tr. 32: 11-16; 46: 12-24; Ex. 3).

55. Most of the time Petitioner did grade-level work in his sixth grade study skills class. (Tr. 44: 3-25; 45: 1-2; 47: 2-5).

56. During his sixth grade year, Petitioner's reading skills significantly improved from slightly below grade level to above grade level. (Tr. 45: 3-10).

57. For study skills class, students had an assignment book in which they were to note their assignments for each class. (Tr. 55: 10-15). These books were graded weekly, and were reviewed to see whether the book had been signed by the parents. (Tr. 55: 12-18).

58. The assignment book comprised 10% of the study skills grade. (Tr. 57: 15-17).

59. Petitioner did not turn in his assignment book very often. (Tr. 52: 4-6; 56: 14-18).

60. Petitioner is not learning disabled in the area of math reasoning or math calculation. (Tr. 87: 22-25; 88: 1-15).

61. Petitioner has above average math skills, including an above average ability to do math work in his head. (Tr. 63: 15-25; 64: 1-5; 80: 21-25; 81: 1).

62. Petitioner did well when he worked in math class, and he did well on tests, but he did not do his homework. (Tr. 64: 9-21; 80: 21-25; 88: 16-18).

63. Petitioner did not want to do his math work, though he was capable of doing well in sixth grade math if he had wanted to do so. (Tr. 63: 15-25; 64: 1-5).
64. Petitioner did not even do 25% of his math homework. (Tr. 87: 15-19).
65. Homework comprised at least 80% of the math grade. (Tr. 64: 22-25; 85: 3-9).
66. Petitioner received an “F” in math for both the first quarter and the first semester. (Tr. 65: 10-17; Exs. 3,4).
67. Petitioner received an “F” even with his grading on a modified 50% scale. Even on this scale, Petitioner only achieved an overall grade of 31% for the first quarter. (Tr. 86: 6-19; 92: 1-8; Ex. 3).
68. Petitioner’s low math grade is directly attributable to his refusal to do the homework. (Tr. 64: 6-25; 65: 18-22; 80: 15-20).
69. At the end of the first semester of his sixth grade, Petitioner’s grades were as follows: three “B’s”, one “B-“, one “C,” one “C-“ and one “F.” (Ex. 4).
70. Petitioner’s grades declined during the second semester of his sixth grade year. (Tr. 36: 22-24; 149: 7-13; 153: 5-10).
71. Petitioner’s absences increased second semester. (Tr. 153: 5-14). He averaged between 17 and 20 absences per class during second semester. (Tr. 153: 15-25).
72. Petitioner’s mother began pulling him out of school second semester so that he did not have to serve disciplinary consequences. (Tr. 152: 19-23; 155: 24-25; 156: 1-25; 157: 1-11; Ex. 13).
73. Petitioner’s absences had a negative impact on his second semester grades. (Tr. 50: 13-25; 51: 1-12; 153: 15-25; 154: 1-3).
74. Petitioner’s grades at the end of his sixth grade year were better than his grades at the end of his fifth grade year, even though he had a BIP at the end of his fifth grade year and no BIP during the relevant period of his sixth grade year. (Tr. 253: 18-25; 254: 1-25; 255: 1-7; Exs. 2,4, 6, F).

### **Sixth Grade Behavior**

75. Petitioner was capable of being a very pleasant student in class. (Tr. 31: 9-25; 34: 3-5; 65: 23-25).
76. Petitioner liked science and seemed to especially enjoy science labs. (Tr. 31: 9-25).
77. Petitioner helped other students with their science labs. (Tr. 32: 22-25; 33: 1-4).

78. Petitioner did not stand out as being any more misbehaved than other sixth grade students. (Tr. 67: 2-7; 132: 3-7; 133: 9-14; 134: 2-13; 21-24).

79. Neither Petitioner's sixth grade science teacher nor his study skills teacher kept a behavior file on him, although they did need to do so for other students who had behavioral problems in their classes. (Tr. 33: 14-25; 34: 1-2; 48: 5-16).

80. Of the over 550 office referrals that the middle school principal received during the 2003-2004 school year, during the time period at issue, approximately 9 of those were for Petitioner. (Tr. 132: 3-7; 134: 12-13; 133: 9-14; Exs. 16, 17).

81. Petitioner exhibited normal sixth grade behaviors in the classroom. (Tr. 47: 8-15).

82. Petitioner's classroom behavior did not negatively affect his grades. (Tr. 51: 7-12).

83. An 8<sup>th</sup> hour is 45 minutes of time served after school. (Tr. 135: 24-25; 143: 6-7).

84. Over the course of the relevant time period, Petitioner received approximately seven 8<sup>th</sup> hours. (Ex. 17). They were for refusing to stop talking, talking back, making noises, failing to follow directions, tardiness, and general disruptiveness during class. (Ex. 17; Exs. A, B). This averages approximately one 8<sup>th</sup> hour per month.

85. Spread over the time period at issue, Petitioner received approximately nine office referrals. (Exs. 16, 17). The office referrals were for calling another student a name, hitting other students, spitting on the floor, insubordination, threatening students, being disruptive, making noises and talking. (Exs. 16, 17).

86. At least one of the office referrals occurred during breakfast, not during class time. (Tr. 52: 10-22; 54: 9-25; 55: 1-9; Ex. 17).

87. Petitioner received some in-school detention days as a result of his office referrals. (Exs. 16, 17).

88. The behavior that caused the office referrals did not result from an ongoing pattern of behavior, but instead resulted from discreet incidents. (Tr. 67: 8-12).

89. Behavior plans sometimes become necessary when students display consistent behavioral problems. (Tr. 140: 13-25).

90. Petitioner never reached the level of displaying consistent behavioral problems. (Tr. 141: 1-8).



91. Petitioner brought an MP3 player to school one day, and he refused to give it to his classroom teacher when she requested it. (Tr. 106: 8-21). However, Petitioner turned the MP3 player over to his counselor without incident, and he did not have any other problems that day. (Tr. 106: 8-25; 107: 1-8).

92. During the second semester, Petitioner did not serve some of his 8<sup>th</sup> hours and in-school detentions. (Tr. 143: 1-6; 150: 14-17; 151: 9-17; 152: 19-25; 153: 1-4).

93. In some cases Petitioner's mother would inform the school that Petitioner would not serve an 8<sup>th</sup> hour. (Tr. 152: 19-23).

94. In addition, Petitioner's Mother did not allow Petitioner to serve some days of in-school detention. (Tr. 155: 24-25; 156: 1-25; 157: 1-11; Ex. 13). She would pick Petitioner up from school so that he missed the 8<sup>th</sup> hour and not allow him to attend school if he had an in-school detention day. (Tr. 152: 19-23; 155: 24-25; 156: 1-25; 157: 1-11; Ex. 13).

95. When a student misses serving an 8<sup>th</sup> hour, the consequence is automatic receipt of one day of in-school detention. (Tr. 150: 25; 151: 1-3).

96. When Petitioner served in-school detention, pursuant to his IEP, he was provided with full services. (Tr. 165: 15-24; 173: 6-25; 174: 1-11).

97. When Petitioner was absent from school, he did not receive services. (Tr. 175: 5-21).

98. Petitioner's attitude and demeanor were different second semester. (Tr. 36; 13-19). He was grumpy and not as happy as he had been first semester. (Tr. 34: 3-5; 36: 13-19).

99. When teachers or the principal tried to correct Petitioner's behavior second semester, he had an attitude as if he could not be treated that way and was not subject to discipline. (Tr. 36: 25; 37: 1-21; 149: 7-25; 150: 1-24).

100. Petitioner made comments to the effect that certain things could not be done because it was not in his IEP. (Tr. 37: 15-21).

101. Petitioner commented that he heard what his teachers said about him on a tape of his IEP meeting and that he knew from the tape that the school could not take certain action. (Tr. 37: 15-21; 150: 11-14).

102. Petitioner is capable of responding to redirection, and he often did so during his sixth grade year. (Tr. 47: 13-21, 25; 48: 1-7; 49: 6-25; 50: 1-3; 68: 14-15; 138: 4-15; 139: 4-15).

103. Petitioner knows the difference between right and wrong. (Tr. 139: 4-6).

104. Petitioner is capable of controlling his behavior and being held accountable for his behavior. (Tr. 37: 22-25; 38: 1; 49: 6-18; 68: 11-13).

105. During the due process hearing in this matter, Petitioner sat quietly for approximately eight hours. (Tr. 251: 13-25; 252: 1-2; 261: 14-16). He did not make any noises, nor did he make any tapping noises that disrupted the hearing. (Tr. 251: 13-25; 252: 1-2; 261: 14-16).

#### **Effect of Behavior on Learning**

106. At the September 8, 2003 IEP meeting, the team determined that Petitioner's behaviors did not impede his learning or the learning of others. (Tr. 96: 18-23; 97: 1-25; 98: 1-6, 18-25; 99: 1-19; Ex. 6).

107. During the relevant time period, Petitioner's behavior did not impede his learning or the learning of others. (Tr. 35: 8-11; 50: 4-12; 122: 14-22; 176: 16-21).

#### **The Parents**

108. The BIP that the Parents claim Petitioner needed would only have addressed certain behaviors such as tapping, making noises, and fidgeting/getting out of his chair. (Tr. 266: 9-25; 267: 1-2; Ex. 1).

109. The parents were unable to identify what the content should be of a BIP to address Petitioner's tapping, making noises, and fidgeting/getting out of his chair. (Tr. 241: 10-25; 242: 1).

110. The Parents admit that there is no strategy that will completely eliminate Petitioner's fidgeting, getting out of the chair, and related behaviors. (Tr. 247: 4-14).

111. The Parents do not claim that the BIP should have addressed behaviors such as biting, hitting, or threatening other students. (Tr. 236: 5-11).

112. The Parents believe that Petitioner should be subject to regular discipline for biting, spitting, hitting, or threatening behavior. (Tr. 235: 10-14; 236: 5-11; 250: 15-18; 267: 11-25; 268: 1-12).

113. The Parents admit that Petitioner learned during his sixth grade year, he made some academic progress, and he made progress toward his IEP goals. (Tr. 250: 19-25; 251: 1-12).

114. The Parents' disagreement with the District concerns what methodology the school uses to manage Petitioner's behavior. (Tr. 246: 16-25; 247: 1; 248: 21-25; 249: 1-2; Tr. 259: 19-25; 260: 1-12).

### **Witnesses**

115. Petitioner's sixth grade science teacher was Kathy Budd. (Tr. 31: 9-25).

116. Amy Shimek was Petitioner's sixth grade study skills teacher.

117. Elbert Biddlecome, Petitioner's sixth grade math teacher, testified that Petitioner had his class seventh hours. (Tr. 63: 4-14).

118. Evelyn Boyle, Petitioner's middle school counselor, testified that she was involved in Petitioner's IEP meetings. (Tr. 95; 16-23; 96: 7-17).

119. David Hedrick was Petitioner's middle school principal and a member of Petitioner's IEP team. (Tr. 132: 3-13; 141: 25; 142: 1-2).

120. Kim Calvin, the Special Education Director, attended every IEP meeting during Petitioner's sixth grade year (Tr. 169: 5-12; 170: 5-7).

### **CONCLUSIONS OF LAW**

1. Petitioner is a "child with a disability," as that term is defined in the IDEA, its regulations, 34 C.F.R. Section 300.7, and the State Plan in that Petitioner's disability meets the categorical definition of "specific learning disability-written expression" set forth in the *Missouri State Plan for Special Education Regulations Implementing Part B of the Individuals With Disabilities Education Act* ("State Plan") p. 18.

2. The District is a Missouri public school district organized pursuant to R.S.Mo. Section 162.211 et seq.

3. The IDEA, its regulations and the State Plan set forth the rights of students with disabilities and their parents and regulate the responsibilities of educational agencies, such as the District in providing special education and related services to students with disabilities.

4. The State Plan was in effect at all material times during this proceeding. The State Plan constitutes regulations of the State of Missouri which further define the rights of students with disabilities and their parents and regulate the responsibilities of educational agencies, such as the District, in providing special education and related services to students with disabilities.

5. The purpose of the IDEA and its regulations is: (1) "to ensure that all children with disabilities have available to them a free appropriate public education that includes special education and related services to meet their unique needs"; (2) "to ensure that the rights of children with disabilities and their

parents are protected”; and (3) “to assess and ensure the effectiveness of efforts to educate those children.”  
34 C.F.R. Section 300.1.

6. The IDEA requires that a disabled child be provided with access to a FAPE. Board of Educ. v. Rowley, 458 U.S. 176, 102 S.Ct. 3034, 3049 (1982). The term “FAPE” is defined by 34 C.F.R. Section 300.8 as follows:

- “ . . . the term ‘free appropriate public education’ means special education and related services that-
- (a) Are provided at public expense, under public supervision and direction, and without charge;
  - (b) Meet the standards of the SEA, including the requirements of this part;
  - (c) Include preschool, elementary school, or secondary school education in the State involved; and
  - (d) Are provided in conformity with an IEP that meets the requirements of Sections 300.340-300.350.”

A principal component of the FAPE definition is that the special education and related services provided to students with a disability, “meet the standards of the SEAAte Board of Education), and “the requirements of this part.” 34 C.F.R. Part 300.

7. The IDEA is designed to enable children with disabilities to have access to FAPE which is designed to meet their particular needs. O’Toole by O’Toole v. Olathe District Schools, 144 F. 3d 692, 698 (10<sup>th</sup> Cir. 1998). The IDEA requires the District to provide a child with a disability with a “basic floor of opportunity . . . which [is] individually designed to provide educational benefit to the handicapped child.” Rowley, 102 S.Ct. at 3047. In so doing the IDEA does not require that a school district “either maximize a student’s potential or provide the best possible education at public expense.” Id. at 3049; Fort Zumwalt School Dist. v. Clynes, 119 F. 3d 607, 612 (8<sup>th</sup> Cir. 1997); A.W. v. Northwest R-I School Dist., 813 F.2d 158, 163-64 (8<sup>th</sup> Cir. 1987). Likewise, the IDEA does not require a school district to provide a program that will “achieve outstanding results,” E.S. v. Independent School Dist. No. 196, 135 F.3d 566, 569 (8<sup>th</sup> Cir. 1998), that is “absolutely [the] best,” Tucker v. Calloway County Board of Educ., 126 F.3d 495, 505 (6<sup>th</sup> Cir. 1998), that will provide “superior results,” Fort Zumwalt, 119 F.3d at 613, or that will provide the placement the parents prefer. Blackmon v. School Dist. of Springfield, R-12, 198 F. 3d 648 (8<sup>th</sup> Cir. 1999); E.S., 135 F. 3d at 569. See also Tucker, 136 F. 3d at 505; Board of Educ. v. Illinois State Board of Educ., 938 F. 2d 712, 716-17 (7<sup>th</sup> Cir. 1991).

8. In making “appropriateness” determinations, deference should be given to the decisions made by the District’s professional educators. “[W]hen reviewing an IEP [courts and hearing panels] must keep in mind that the state and local educational agencies are deemed to possess expertise in education policy

and practice.” Burilovich v. Board of Educ., 208 F.3d 560, 567 (6<sup>th</sup> Cir. 1999); accord Fort Zumwalt School Dist. v. Clynes, 119 F.3d 607, 610 (8<sup>th</sup> Cir. 1997) (courts should reject a reviewing officer’s analysis if it does not appear to give sufficient weight to the views of the professional educators). Indeed, when an IEP is reasonably developed to provide a child with a FAPE, questions of methodology must be left to the school district. Johnson v. Olathe Dist. Schools, 316 F. Supp. 2d 960, 975 (D. Kan. 2003).

9. The Supreme Court in Rowley established a two-part test for determining whether a child is receiving FAPE: (1) whether the IDEA procedures have been followed; and (2) whether the IEP developed for the child was “reasonably calculated to enable the child to receive educational benefits.” 458 U.S. at 206-07.

10. If parents believe that the educational program provided for their child fails to meet this standard, they may obtain a state administrative due process hearing. 34 C.F.R. Section 300.506; Thompson v. Board of the Special School Dist. No. 1, 144 F.3D 574, 578 (8<sup>th</sup> Cir. 1998); Forth Zumwalt, 119 F.3d at 610.

11. Petitioner and his Parents were afforded their due process rights as required by the IDEA, 20 U.S.C. Section 1415 (h), the IDEA Regulations, 34 C.F.R. Section 300.509(a) and the State Plan, including, but not limited to, the following rights at the due process hearing:

- A. The right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities.
- B. The right to present evidence and confront, cross-examine, and compel the attendance of witnesses;
- C. The right to prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing;
- D. The right to obtain a written, or at the option of the Parents, electronic, verbatim record of the hearing; and
- E. The right to obtain written, or at the option of the Parents, electronic findings of fact and decisions.

12. During the 2003-2004 school year, through the date that the Parents initiated due process, Petitioner was provided FAPE by the District in that the District: (1) has followed the procedures of the IDEA and State Plan; and (b) the sixth grade IEP which was developed by the

District was reasonably calculated to enable Petitioner to receive educational benefits as is more fully set forth below.

### **DECISION**

1. Issue: Whether the Respondent provided Petitioner with FAPE during the 2003-2004 school year, up to the date of the Parents' due process request?

The Parents focused on the lack of a behavior intervention plan ("BIP") in the IEP that governed Petitioner's 2003-2004 school year. However, the parents did not argue or contend that: (1) the IEP prepared by Petitioner's IEP team was not reasonably calculated to provide Petitioner with educational benefits; (2) the evaluation of Petitioner and the development of his IEP was incorrect, inappropriate or procedurally flawed; or, (3) that the District engaged in any procedural violation of the IDEA or the State Plan.

Having thoroughly reviewed the record, including the documentary evidence admitted into the record, the Hearing Panel finds that Petitioner was provided FAPE by the District during the 2003-2004 school year, up to the date that the Parents requested due process, in that: (1) the District has followed the procedures of the IDEA and the State Plan; and (2) the IEP which was developed by the District was reasonably calculated to enable Petitioner to receive educational benefits.

This decision was rendered on the 21<sup>st</sup> day of September, 2004, which is the agreed decision date.

SO ORDERED:

/s/ Robert P. Baine, Jr.  
Robert P. Baine, Jr., Chairperson

Concur:

/s/ Beth Mollenkamp  
Beth Mollenkamp

Concur:

/s/ Kim Ratcliffe  
Kim Ratcliffe

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing was sent by electronic and regular mail, postage prepaid, this 21<sup>st</sup> day of September, 2004, to the following:

**Via electronic mail to:**

Department of Elementary & Secondary Education  
[WANDA.ALLEN@DESE.MO.GOV](mailto:WANDA.ALLEN@DESE.MO.GOV).

**Via U.S. Mail and facsimile to:**

Ms. Beth Mollenkamp  
11927 Glenwest Drive  
Maryland Heights, MO 63043  
Panel Member

Dr. Kim Ratcliffe  
MSBA Office of Special Education  
2100 I-70 Drive  
Columbia, MO 65203  
Panel Member

**Via U.S. Mail to:**

Ms. Shellie L. Guin  
Doster Mickes James & Ullom LLC  
4600 Madison, Suite 711  
Kansas City, MO 64112

Parents